IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 11, 2008 Session

WILLIAM CLARK MOORE v. DONNA LYNN MOORE (ERICKSON)

Appeal from the Fourth Circuit Court for Davidson County
No. 98D-2088 Carol Soloman, Judge, by Interchange

No. M2007-01966-COA-R3-CV - Filed February 12, 2009

Donna Lynn Moore ("Mother") and William Clark Moore ("Father") were divorced in 1999. Among other things, Father was ordered to pay one-half of the medical expenses incurred for the parties' child that were not otherwise covered by health insurance. Mother filed a petition for contempt claiming Father was behind on his payments for the child's health care costs. An Agreed Order was entered which held in abeyance a determination of Father's arrearage because Father had lost his job in a workforce reduction. After Father found employment, Mother filed another petition for contempt, asserting that Father still was not paying his share of the child's medical bills. Following a hearing, the Trial Court agreed with Mother, found Father in civil contempt, and had Father jailed until he paid Mother $7,163.91 for his share of the child's medical bills that were not covered by health insurance. Father appeals claiming, among other things, that some of the $7,163.91 in medical bills he was ordered to pay had been resolved with entry of the earlier Agreed Order and, therefore, any claim for them was barred by res judicata. Father also claims the Trial Court erred when it approved the statement of the evidence submitted by Mother. We affirm in part, vacate in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and THOMAS R. FRIERSON, II, SP. J., joined.

Andrew M. Cate, Nashville, Tennessee, for the Appellant, William Clark Moore.

James L. Curtis, Nashville, Tennessee, for the Appellee, Donna Lynn Moore (Erickson).

OPINION

Background

Father and Mother were divorced on June 28, 1999, based upon irreconcilable differences. According to the marital dissolution agreement, Father's child support payment would have been $1,174.00 per month pursuant to the child support guidelines. However, Father agreed to pay child support in the amount of $1,900.00 per month. In addition, Father was required to pay one-half of all medical expenses incurred by the parties' child that were not covered by health insurance. Father also was required to pay alimony in solido in the amount of $600 per month for sixty months, as well as obtain a life insurance policy in the amount of $200,000 naming the parties' minor child as the sole beneficiary. The marital dissolution agreement further provided that:

> The Wife shall be awarded One Hundred Thousand (100,000) miles of the Husband's Delta frequent flyer miles, and the parties shall execute any documents necessary in order to divest these frequent flyer miles from the Husband to the Wife.
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> * * *
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> These parties are the owners of a timeshare unit in Hilton Head, South Carolina. The parties have agreed that this property shall be sold as soon thereafter as possible. Until such time as the sale is effectuated, each party shall pay Fifty-Four and 01/100 Dollars ($54.01) of the timeshare monthly mortgage payment and maintenance fee. Upon the sale of the timeshare, and after payoff of the existing mortgage, all remaining net proceeds received, after closing costs, shall be split equally between the parties.

In January 2004, Father filed a petition to modify his child support payment, claiming that he was laid-off from his job and that his severance pay had ended in December 2003. When this petition was filed, Father was receiving $247 per week in unemployment compensation benefits.

Mother responded to Father's petition to modify and, thereafter, filed a petition seeking to have Father held in contempt of court. Mother claimed Father was $1,800 behind in child support payments and was behind over $3,750 for his one-half share of the medical expenses incurred by the parties' child that were not covered by health insurance. Mother also claimed that Father was in violation of the final divorce decree because he: (1) had not maintained a $200,000 life insurance policy naming the parties' child as the sole beneficiary; (2) had not transferred all of the 100,000 frequent flyer miles to Mother; and (3) had not made his share of the mortgage and maintenance payments on the timeshare and owed Mother $1,581.30 for this expense.

In March 2004, an Agreed Order was submitted to and entered by the Trial Court. As pertinent to this appeal, this Agreed Order provides:

> 1. Father's child support shall be reduced to the sum of $500.00, effective the month of February, 2004, as a result of Father losing his job due to [a] company-wide workforce reduction;
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> 2. After June, 2004, either party may file a motion to review Father's employment status and the amount of child support Father should be paying if Father has secured new employment, and to determine the amount of any arrearage due;
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> 3. Father's alimony *in solido* payments to [Mother] . . . shall be suspended through the month of June 2004 . . . .

In September 2005, Mother filed another petition seeking to have Father held in contempt of court. Mother also sought a determination of the appropriate amount of Father's child support payment. Mother claimed that Father was behind $1,800 on alimony payments. Mother also alleged that Father still was refusing to pay one-half of their child's medical expenses that were not covered by health insurance. According to Mother, Father also was not paying on the timeshare and had not transferred the total amount of frequent flyer miles that he was required to transfer according to the terms of the final divorce decree.

A hearing was conducted in April 2007 on Mother's petition for contempt. Following this hearing, the Trial Court entered an order stating as follows:

> This cause came for final hearing . . . upon the Petition for Civil and/or Criminal Contempt and to Modify Child Support. Whereupon, hearing statements and arguments of counsel, as well as testimony from the parties . . . it is, accordingly,
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> ORDERED, ADJUDGED AND DECREED that [Father] is found in willful civil and criminal contempt[1] of the prior orders of the Court. It is, further,
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> ORDERED, ADJUDGED AND DECREED that [Father] shall be incarcerated in the Davidson County Jail until such time as he purges himself of the contempt by paying his portion of the uncovered medical expenses in the amount of $7,163.91. It is, further,

[1] This finding later was changed to be only for civil contempt.

> ORDERED, ADJUDGED AND DECREED that the father's child support obligation is increased to $990 per month beginning on May 1, 2007 and shall be due on the first day of each month thereafter. It is, further,
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> ORDERED, ADJUDGED AND DECREED that the mother is awarded a judgment in the amount of $8,820 as a retroactive child support increase from the date of the filing of the petition, for which execution shall issue, if necessary. It is, further,
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> ORDERED, ADJUDGED AND DECREED that [Mother] is awarded a judgment for which execution shall issue, if necessary, in the amount of $1,500 for her portion of the frequent flyer miles. It is, further,
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> ORDERED, ADJUDGED AND DECREED that [Mother] is awarded a judgment for which execution shall issue, if necessary, in the amount of $2,500 for expenses she incurred for the parties' time share. It is, further,
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> ORDERED, ADJUDGED AND DECREED that [Father] will cure the total judgment balances of $12,900 by paying $150 per month, directly to the mother, beginning on May 1, 2007 and due on the first day of each month thereafter. It is, further,
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> ORDERED, ADJUDGED AND DECREED that the father will provide proof of a life insurance policy insuring his life in the amount of $200,000 and immediately name the mother . . . as trustee for the minor child as beneficiary of the policy. It is, further,
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> ORDERED, ADJUDGED AND DECREED that the mother's attorney . . . is awarded a judgment for attorney's fees in the amount of $2,700 for which execution shall issue, if necessary. . . . (footnote added)

Father appeals the final judgment and raises the following issues, which we take verbatim from his brief:

> I. Did the Trial Court err by addressing matters barred by the doctrine of race (sic) judicata?

II. Did the Trial Court err by failing to sustain Father's attorney's objection to the admission of the purported records of medical expenses?

III. Should Father's statement of the evidence have been adopted by the Court?

IV. Did the Trial Court err by failing to make specific findings regarding child support, and in failing to use the required child support worksheet?

Mother argues that the Trial Court was correct in its decision. Mother also requests an award of attorney fees incurred on appeal.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

On appeal, we have not been provided with a transcript from the April 2007 hearing. However, we have been provided with a statement of the evidence approved by the Trial Court. While both Mother and Father, at some point, submitted a statement of the evidence to the Trial Court for approval, the Trial Court approved the statement submitted by Mother. That statement of the evidence provides as follows:

> [Mother] would show that this matter was heard before the Court without the benefit of a court reporter or any audio recording. . . .
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> Upon testimony of the parties, the Court found that [Father] was not a credible witness and found him to be guilty of willful civil contempt. Upon being found guilty of willful civil contempt, [Father] was incarcerated until he purged himself of the contempt by paying his portion of the outstanding medical bills in the amount of $7,163.91. The Court found before sentencing [Father] that he had the capabilities of paying the arrearage. He makes over $8,500.00 per month and gets a significant bonus every month and again at three months.

> The testimony of the parties indicated that the father's child support should be increased to be $990.00 per month in accordance with the Child Support Guidelines. The child support was retroactive to the date of filing of the mother's petition. (May 1, 2007).
>
> The Court awarded [Mother] a judgment for $2,500 for expenses she incurred for the time share. [Mother] testified that the Final Decree of Divorce was entered in 1999; however, [Father] did not sign a quitclaim deed until February, 2004. During the intermittent times, [Father] never paid any of the expenses associated with the timeshare. Testimony further showed that at the time that [Father] signed the original quitclaim deed, he was to be responsible for recording the same with the County Register's Office. [Mother] was not provided with a recorded quitclaim deed and according to tax records, [Father] is still listed as an "owner" of the timeshare.
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> [Mother's] testimony further indicated that she had not been provided use of the frequent flyer miles that were awarded to her in the Final Decree of Divorce. As compensation to [Mother] for disposal of frequent flyer miles, the Court awarded her a judgment in the amount of $1,500.
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> Although [Father] objected to payment of the medical expenses, indicating that the expenses were very old, [Mother] testified that she had been forwarding the expenses to [Father] since the time they had been incurred and that [Father] was fully aware of all of the minor child's medical conditions. [Mother] testified that the expenses had been provided to [Father] in a timely manner, on more than one occasion, via certified mail and/or overnight delivery. All original medical expenses were provided to the Court as an Exhibit. The Court Officer made additional copies of all of the medical expenses for [Father's] attorney.
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> The testimony further indicated that the father had not provided proof of the life insurance policy he was previously ordered to provide. The Court ordered that the father provide proof of the insurance policy and to name [Mother] as trustee for the minor child as beneficiary of the policy. . . .

The first issue we address is whether the Trial Court erred when it approved the statement of the evidence submitted by Mother. Father essentially claims that his statement of the evidence should have been approved because Mother did not timely object to the contents in his statement.

Father's argument on this issue is disingenuous based on the history of this appeal. On November 12, 2007, this Court entered an order requiring Father to show cause as to why his appeal should not be dismissed for his failure to file with the Trial Court a transcript, a statement of the evidence, or a Tenn. R. App. P. 24(d) notice. Father responded to our order not by filing a statement of the evidence with the Trial Court, but by filing a request for an extension of time to file a statement of the evidence. We granted an extension through November 21, 2007. On November 30, 2007, Father still had not complied with our Show Cause Order. Accordingly, this Court entered an Order dismissing his appeal. Almost one month later, Father filed a motion seeking to have the order of dismissal set aside and to allow a late-filed statement of the evidence. Because the goal of the Rules of Appellate Procedure is to allow appeals to be resolved on the merits, we set aside our order of dismissal and allowed Father to late-file his statement of the evidence.

Against this backdrop, Father now claims that Mother's statement of the evidence should not have been accepted by the Trial Court because she did not timely object to the contents of Father's statement. The irony of this position is apparent.

The relevant portions of Rule 24 of the Rules of Appellate Procedure provide as follows:

> (c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. -- If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the statement. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule.
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> * * *

> (e) Correction or Modification of the Record. -- If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive. If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted.

As the rule clearly states, once a trial court approves a statement of the evidence, that determination is conclusive absent "extraordinary circumstances." Given the facts set forth above, we do not consider Mother's untimely objections to Father's extremely late-filed statement of the evidence as an "extraordinary circumstance." Therefore, we conclude that the Trial Court did not err when it approved Mother's statement of the evidence, and we will use the statement of the evidence approved by the Trial Court when resolving Father's remaining issues.

Father's next issue is his claim that the March 2004 Agreed Order resolved any claims for payment of one-half of the child's medical bills that were incurred before the entry of the Agreed Order. Thus, to the extent the Trial Court's final judgment awards Mother a judgment for payment of his share of the medical bills incurred before the entry of the Agreed Order, Father claims that portion of the final judgment is error as those claims were barred by res judicata.

The Agreed Order entered in March 2004, quoted above, makes absolutely no mention of Father's arrearage with respect to his payment of one-half of the child's medical bills, other than to say the amount of any child support arrearage would be determined later. One of the elements of res judicata is that a court of competent jurisdiction actually renders a prior final judgment with respect to the claim for which res judicata is raised as a bar. *See Smith Mech. Contractors, Inc. v. Premier Hotel Dev. Group*, 210 S.W.3d 557, 564 (Tenn. Ct. App. 2006). There is no such final judgment in this case as the Agreed Order does not set forth the amount of Father's arrearage that was incurred up to that point in time, but instead says the arrearage is to be determined at a later date. Furthermore, the Agreed Order's silence as to Father's arrearage, except to say it will be determined later, cannot be interpreted as resolving that claim by forgiving any arrearage because such would result in an impermissible retroactive modification of Father's child support obligation. *See In re Adoption of Hayes*, No. W2006-00156-COA-R3-CV, 2007 WL 845906 (Tenn. Ct. App. Mar. 21, 2007), *no appl. perm. appeal filed* ("In 1987, . . . Tennessee amended its statutes to remove the state courts' authority to forgive past arrearages in child support cases."). Accordingly, we reject Father's second claim.

Father's next issue is his claim that the Trial Court erred when it failed "to sustain Father's attorney's objection to the admission of the purported records of medical expenses." The Statement of the Evidence approved by the Trial Court and utilized by this Court provides that

Father's objection to the introduction of the medical expenses was based on the fact that many of those expenses were "old." Again, Father claims that payment for these "old" medical expenses was resolved when the Agreed Order was entered, an argument we now have rejected. Because Father is required by the final divorce decree to pay one-half of these medical expenses, it does not matter whether they are "old" or not. If we forgave payment of these medical expenses, we would essentially be rewarding Father for holding out as long as he could without making the required payments. We also would be retroactively modifying Father's child support payment, which we cannot do.[2]

Father's final issue is his claim that the Trial Court erred when it failed to use the required child support worksheet when calculating his child support payment. The applicable regulation is Tenn. Comp. R. & Regs. 1240-2-4-.04(1) (2008) which provides as follows:

> 1240-2-4-.04 DETERMINATION OF CHILD SUPPORT.
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> (1) Required Forms.
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> > (a) These rules contain a Child Support Worksheet, a Credit Worksheet, Instructions for both Worksheets, and the Child Support Schedule *which shall be required to implement the child support order determination*. (emphasis added)

On appeal, Mother admits that Child Support Worksheets are required. Mother argues, however, that she prepared several worksheets before trial, but ultimately those worksheets were not accurate because Father's salary was higher than what she originally believed it to be. Because the worksheets are required and because there is nothing in the record suggesting that accurate worksheets were utilized, we vacate the Trial Court's calculation of Father's child support payment and remand this case to the Trial Court for a calculation of Father's child support payment utilizing the required worksheets.

The final issue is Mother's claim that she is entitled to her attorney fees incurred on appeal. Exercising our discretion, we decline to award Mother attorney fees incurred on appeal, but we do feel it is appropriate to tax all of the costs on appeal to Father given the circumstances of this case.

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[2] Father also claims that the medical bills admitted at the hearing "contain a number of duplications." However, Father did not cite us to so much as one of the bills he claims was duplicated. Accordingly, we consider this issue waived. "Courts have routinely held that the failure to make appropriate references to the record . . . as required by [Tenn. R. App. P.] Rule 27(a)(7) constitutes a waiver of the issue." *Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000)(citations omitted).

Conclusion

The judgment of the Trial Court is affirmed in part, vacated in part, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellant, William Clark Moore, and his surety, for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE